BEFORE THE
FEDERAL MARITIME COMMISSION

PETITION OF UNITED PARCEL SERVICE, INC. FOR EXEMPTION PURSUANT TO SECTION 16 OF THE SHIPPING ACT OF 1984 TO PERMIT NEGOTIATION, ENTRY AND PERFORMANCE OF SERVICE CONTRACTS

FMC Petition No. P3-03

PETITION OF NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC. FOR TARIFF REQUIREMENTS OF THE SHIPPING ACT OF 1984

FMC Petition No. P5-03

PETITION OF OCEAN WORLD LINES, INC. FOR A RULEMAKING TO AMEND AND EXPAND THE DEFINITION AND SCOPE OF "SPECIAL CONTRACTS" TO INCLUDE ALL OCEAN TRANSPORTATION NTERMEDIARIES

FMC Petition No. P7-03

PETITION OF BAX GLOBAL INC. FOR RULEMAKING

FMC Petition No. P8-03

PETITION OF C.H. ROBINSON WORLDWIDE, INC. FOR EXEMPTION PURSUANT TO SECTION 16 OF THE SHIPPING ACT OF 1984 TO PERMIT NEGOTIATION, ENTRY AND PERFORMANCE OF CONFIDENTIAL SERVICE CONTRACTS

FMC Petition No. P9-03

COMMENTS OF LANDSTAR SYSTEM, INC.

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Introduction

Landstar System, Inc. ("Landstar") hereby submits its comments in the above-referenced dockets. Landstar is a $1.5 billion transportation company headquartered at 13410 Sutton Park Drive S., Jacksonville, Florida 32224. Landstar is a non-asset based service provider that contracts with equipment operators in all transportation modes to deliver services to its customers. Landstar also provides contract logistics and intermodal transportation services for air, land and ocean transportation users. Landstar's operating companies include Landstar Gemini, Inc., Landstar Inway, Inc., Landstar Ligon, Inc., Landstar Ranger, Inc., Landstar Express America, Inc., and Landstar Logistics, Inc. Both Landstar Express America, Inc. dba Landstar Express International (License No. 13869N) and Landstar Logistics, Inc. (License No. 18204N/F) are non-vessel-operating common carriers ("NVOCCs") operating pursuant to authority granted by the Federal Maritime Commission ("FMC" or "Commission").

Landstar's Position

Landstar supports the goal, expressed in one way or another in each of the five petitions, that NVOCCs should be able to deal with their customers on an individualized, contractual basis rather than pursuant to mandatory filed tariffs, as is the case today. Given that no other type of transportation entity operating in the land, air, or ocean modes is required to file and abide by government-mandated tariffs, the elimination of this requirement for NVOCCs should, in Landstar's view, be a regulatory priority for the Commission.

Non-asset based transportation providers of all types, including NVOCCs, operate in highly competitive, increasingly international markets characterized by low barriers to entry, multi-national competitors and intense market pressures from sophisticated customers, both large and small. Since Congress has already determined that, in each of these transportation modes, the market works better than government regulation to protect customers and foster the development of strong, innovative industry participants, the NVOCC industry should be freed from the shackles of outmoded tariff regulation to achieve these benefits as well. *See, e.g., Airline Deregulation Act* of 1978, 92 Stat. 1705 (1978) (eliminating tariff filing for air carriers), *Staggers Rail Act of* 1980, Pub. L. No. 96-448, 94 Stat. 1895 (Oct. 14, 1980) (permitting rail carriers to enter into private contracts); Surface *Freight Forwarder Deregulation Act of* 7986, Pub. L. No. 99-521 (1986) (eliminating rate filing for domestic freight forwarders); and *Trucking Industry Regulatory Reform Act of* 7994, Pub. L. No. 103-31 1, 108 Stat. 1683 (Aug. 26, 1994) (eliminated motor carrier tariff filing requirements).

The five exemption petitions at issue present three different approaches to achieving the goal of allowing NVOCCs to privately contract with their customers. These are: (1) the elimination of mandatory rate filing for NVOCCs advocated by the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA"), which would effectively allow NVOCCs to enter into unregulated transportation contracts with their customers; (2) permitting NVOCCs - - or some universe of "qualified" NVOCCs - - to enter into service contracts with their customers similar to the service contracts offered by vessel operating carriers as proposed in various manners by the petitions of United Parcel Service, Inc. ("UPS"), BAX Global, Inc. ("BAX"), and C.H. Robinson Worldwide, Inc. ("C.H. Robinson"); and (3) modifying the "special contracts" that licensed ocean freight forwarders are currently able to use with their customers pursuant to the Commission's forwarding regulations to create a regulated type of contract for use by NVOCCs as proposed in the petition of Ocean World Lines, Inc. ("OWL").

Landstar submits that the NCBFAA's approach should be adopted. Eliminating NVOCC tariff rate filing obligations would, at a stroke, immediately free the NVOCC industry to adopt the market-driven contractual solutions customers are demanding for their logistics and pricing solutions. The NCBFAA petition requires only an exemption, which is well within the Commission's power to grant and does not raise the jurisdictional issues inherent in the other four petitions, all of which ask the Commission to create new regulatory mechanisms. Further, in various ways, the other four petitions and the two types of approaches they advocate would serve only to partially deregulate NVOCC pricing activities. The service contract proposals of UPS, BAX and C.H. Robinson contemplate that NVOCCs would be obligated to file these contracts in particular formats with the Commission. The OWL proposal would subject the special contracts, as modified to permit them to be used by NVOCCs, to the business regulation to which ocean freight forwarders are currently subject.

In Landstar's view, there is no need to regulate or supervise NVOCC pricing activities. Just as Congress has previously determined that the market provides sufficient discipline for air freight forwarding pricing activities, domestic rail and motor transportation broker, and domestic freight forwarder pricing activities, the FMC should recognize that the market provides similar protections for customers of NVOCCs. Moreover, under the Commission's licensing and bonding regulations, and the statutory and regulatory requirements attached to each, the Commission has more than enough authority and power to address any unreasonable, unfair, or unlawful acts that might be committed by NVOCCs in the context of their private contracts with customers.

<u>There Is A Need for the Elimination of NVOCC Tariff Rate Filing</u>

As many of the other Petitioners and Commenters have pointed out, the evolving characteristics of the marketplace for ocean services creates a need for the elimination of NVOCC tariff filing requirements. Indeed, the customers for ocean transportation services want -- and are increasingly demanding -- that their service providers deal with them on an individualized, private, contractual basis. This, of course, is a primary reason why Congress eliminated rate transparency in vessel operator service contracts.[1] NVOCC customers, as well (some of whom are the identical companies that

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[1] In justifying the adoption of confidential service contract rates, the Senate Committee on Commerce, Science and Transportation stated:

> Many shippers, especially large volume shippers, expressed concern that the transparency of the U.S. system disadvantages U.S. shippers with respect to their foreign competitors in third markets. In general, foreign nations have not required

patronize the vessel operators), want multimodal, multi-tiered, transportation, logistics, and pricing issues to be addressed in a single contractual arrangement with their service providers.

As the Commission well knows, NVOCC's are no longer simply non-asset based providers operating port-to-port transportation services only. Increasingly, NVOCCs operate as multimodal transportation providers, logistics technicians, and providers of information technology services and solutions to their customers. Further, the combination of services NVOCCs provide may differ from shipment to shipment as well as from customer to customer as they seek to meet each customer's unique and individualized requirements. This is simply not a marketplace where tariffs are useful or meaningful.

In this respect, Landstar's clients have already effectively "voted against" NVOCC tariffs in the way they procure transportation logistics and IT services. They manifestly do not consult Landstar's NVOCC tariffs. They call, or they email, or they meet with Landstar representatives to develop the transportation solutions that address their own particular issues. Indeed, since many of Landstar's international ocean customers are domestic Landstar customers operating in the international market for the first time, it is questionable whether they are even aware that Landstar's NVOCC tariffs exist.'

Moreover, as many of the Petitioners and Commenters have also pointed out, there is a cost and competitive burden associated with tariff filing. Since neither

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transparency of rates or services, and their shippers' rates are not publicly accessible.

Senate Report No. 105-61, 105'" Cong.. 1st Sess. (July 31, 1997) at 4.

2 To the extent that NVOCC customers are aware that tariffs exist, the fact that most NVOCC tariff publishing agents require a fee to even look at the NVOCC tariffs negates the tariffs usefulness. Absent a compelling need and justification for a tariff system that is understood and appreciated by NVOCC customers --which it is not --why would any reasonable customer be willing to pay to see an NVOCC's price list, particularly when that price list offers only a single component, at best, of a solution to the customer's transportation and logistics needs?

NVOCCs nor their customers benefit from the tariff filing regime, these costs are simply "taxes" imposed by the government, which benefit only the tariff filing companies, At best, these tariff filing costs represent a drain on NVOCC resources and prevent them from improving the delivery, or reducing the cost, of the services they offer to their customers. At worst, the cost of tariff filing disadvantage U.S.-based NVOCCs vis-a-vis their foreign competitors and erodes the vitality of the NVOCC industry to the detriment of the American economy. In sum, for all of the reasons discussed above, Landstar submits there is an urgent need to eliminate NVOCC tariff filing requirements without delay.

The Commission Has Full Authority - -And the Encouragement of Congress - - To Eliminate NVOCC Tariff Filing Reauirements

The Commission has full authority to grant the NCBFAA's petition and eliminate tariff rate filing requirements for NVOCCs. Section 16 of the Shipping Act, which was amended by Congress in the Ocean Shipping Reform Act of 1998 ("OSRA"), provides, in relevant part:

> The Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this Act or any specified activity of those persons from any requirement of this Act if it finds that the exemption will not result in substantial reduction and competition or be detrimental to commerce.

46 U.S.C. App. §1715 (2003). Thus, if the Commission makes the two findings set forth at the end of this Section, it has been fully authorized by Congress to exempt any type of agreement or activity from the requirements of the Shipping Act.

There can be little doubt that eliminating NVOCC tariff rate filing will not result in a substantial reduction in competition or be detrimental to commerce. As discussed in the preceding sections of these comments, NVOCC rate filing, if anything, reduces competition because it hampers NVOCCs' ability to provide innovative, multi-modal logistics solutions to their customers in the context of private contracts covering both regulated and unregulated services. Moreover, the costs of adhering to the tariff filing requirements divert NVOCC resources from providing better services or lower costs to their customers, both of which are important competitive factors. Further, eliminating the dead hand of tariff filing from the NVOCC industry will be a benefit to U.S. oceanborne commerce because it would enable NVOCCs to focus completely on the marketplace and meeting their competition in developing better services and solutions for their customers. It would also free U.S. based NVOCCs from a regulatory restraint that inhibits them in meeting foreign competition.

Not only is the Commission empowered to exempt this activity; it has been encouraged by Congress to look favorably on proposals to deregulate the ocean shipping industry. In passing OSRA, Congress broadened the scope of the Commission's exemption authority in Section 16 as a means to "facilitate" exemptions from the Shipping Act. Senate Report No. 105-61, 105th Cong., 1st Sess. 30 (1997). Moreover, Congress made its desire that the Commission use this exemption authority to further deregulate the ocean shipping industry explicit in this Senate Report, stating that:

> The policy underlying this change [i.e., the broadening of exemption authority] is that while Congress has been able to identify broad areas of ocean shipping commerce for which reduced regulation is clearly warranted, the FMC is more capable of examining through the administrative process specific regulatory provisions and practices not yet addressed by Congress to determine whether they can be deregulated consistent with the policies of Congress.

Id. The same report gave a very clear indication of what is meant by "the policies of Congress." In discussing OSRA's purposes, this report stated:

> the committee bill attempted to balance the need to deregulate the industry with the need to provide the oversight of industry practices, given the immunity from the antitrust laws.

Id. at 5. In speaking of the "need to deregulate" it seems clear that Congress meant for the Commission to be proactive in using its newly increased exemption power.

In this respect, it is instructive that Congress, in passing OSRA, determined to eliminate the public rate filing requirement for service contracts of vessel operators. Congress therefore determined that transparency for vessel operators pricing activities is one of those areas "for which reduced regulation is clearly warranted." Since the vessel operators possess antitrust immunity, and Congress was explicit in the OSRA Senate Report about the need to protect the shipping public from the dangers of this antitrust immunity, one must conclude that Congress has determined that rate transparency is not a requirement for protecting competition in the ocean shipping industry. And, if the vessel operating carriers may be trusted to enter into private, individualized, discriminatory,[3] contractual arrangements with their customers, why can't NVOCCs - - which have no antitrust immunity and operate in a fiercely competitive marketplace - - also be trusted with the authority to enter into private, individually negotiated contractual arrangements with their customers?

It is true, of course, that the OSRA Congress voted not to give NVOCCs service contract authority. That vote, however, occurred at a time when Congress had just decided to allow vessel carriers to enter into private contracts and did not know how that deregulatory measure would work. The ocean shipping industry was also much different five years ago than it is today, as has been pointed out in a number of the petitions. In the intervening years, the OSRA experiment in private contract arrangements between ocean carriers and their customers has been a success as the Commission itself has recognized in its report on *OSRA. Federal Maritime Commission, The Impact of The Ocean Shipping Reform Act of 1998* at 21 (2001). And, given the changes in the ocean shipping industry - - and in the NVOCC industry - - in the intervening five years, a fresh look at the possibility of NVOCC contracts is clearly

[3] OSRA also eliminated the prohibitions against unjust discrimination between shippers arising from vessel operators' service contracts.

warranted. In addition, of course, the NCBFAA Petition is not seeking service contract authority for NVOCCs but only the elimination of tariff rate filing requirements.

Summary

In sum, for the reasons stated, Landstar submits that the Commission should grant the NCBFAA's Petition and eliminate rate filing requirements for NVOCCs at the earliest opportunity.

Respectfully submitted,

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